



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

January 14, 2008

David L. Pippen, Policy Director
Office of the Governor
State House, Room 206
Indianapolis, IN 46204

Dear Mr Pippen:

Thank you for sending us a copy of draft legislation currently under consideration in Indiana relating to environmental criminal enforcement (Indiana Code IC 13-30-10-1.5, and related provisions). If enacted, we believe it will enhance Indiana's criminal environmental program and strengthen the deterrent for those who would violate environmental laws. We have examined the proposed legislation for consistency with applicable federal statutes and regulations which require Indiana to maintain an adequate enforcement program under the Clean Air Act, the Clean Water Act and the Resource, Conservation and Recovery Act. Regulations concerning these requirements are listed at 40 CFR 51.230, 40 CFR 63.91(d), 40 CFR 70.11, 40 CFR 123.27 and 40 CFR 271.16.

In general, we find that the proposed rule provides adequate criminal enforcement authority for a broad spectrum of Indiana's environmental statutes and regulations. However, we noted that a rule relating to source-specific operating agreements (IC 13-17-13) is excluded from the list of statutes subject to criminal enforcement. Some of the agreements obtained under this rule are federally enforceable, and thus we feel it would be important for Indiana to have criminal enforcement capability for these agreements. We understand that the State intended the agreements created under the rule to be subject to criminal enforcement as permits under Section 1.5(a)(3). Given the fact that IC 13-17-13 contemplates the creation of an agreement rather than a "permit," we recommend that the word "agreements" be added to Section 1.5(a)(3).

We also have several general comments on the proposed legislation:

-The first sentence of section 1.5(a) states that a person who does "any one (1) or a combination of" the listed crimes "commits a Class D felony"(emphasis added). In cases in which a defendant is charged with multiple violations, could this language be interpreted to limit the punishment available to only a single violation?

-Section 1.5(a)(2) encompasses violations of rules "adopted by a board to implement a statute referred to in subdivision (1)"(emphasis added). This phrasing might be clarified by referring instead to a board "authorized to" implement such statutes.

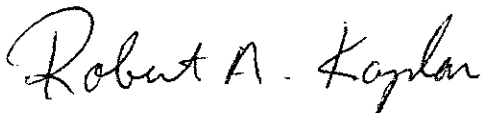
-Section 1.5(a)(4) adds a negligence crime, as required by the federal regulation pertaining to state program approvals under the Clean Water Act. We note that Clean Water Act negligence crimes have been held to be simple negligence crimes, rather than gross negligence or recklessness. See *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000); *United States v. Ortiz*, 427 F.3d 1278 (10th Cir. 2005).

- The Clean Air Act sets out the crimes of negligent and knowing endangerment related to the release of a hazardous air pollutant at 42 U.S.C. §§7413(c)(4) and (c)(5), respectively. In addition, the Clean Water Act contains a knowing endangerment crime at 33 U.S.C. §1319(c)(3). We encourage the State to consider enacting similar provisions.

-The current Indiana provisions criminalizing violations of its wetlands program are unaffected by this legislation. Should Indiana seek federal approval for wetlands authority under the Clean Water Act, we would need to review the language for consistency with regulatory approval requirements.

With these comments in mind, we believe the proposed legislation is consistent with the federal statutes and regulations referenced above, and provides adequate enforcement authority for criminal environmental prosecutions. We are pleased that our offices were able to agree on these amendments and are thankful for your efforts to accommodate our concerns.

Sincerely yours,

A handwritten signature in cursive script that reads "Robert A. Kaplan". The signature is written in dark ink and is positioned above the typed name and title.

Robert A. Kaplan
Regional Counsel